

NO. 76-818

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

R. D. FITCH, ET AL., APPELLANTS

V.

HIJINIO SILVA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM

GEORGE J. KORBEL
Apt. 1801, 7200 So. Presa
San Antonio, Texas 78223
(512) (533 - 3973)
COUNSEL OF RECORD
FOR RUDY GONZALES

LUIS M. SEGURA
523 So. Main
San Antonio, Texas 78204
(512) (225 - 6191)
COUNSEL OF RECORD
FOR NOEL PEREZ

APPELLEES

January 19, 1977

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Now comes Rudy Gonzales and Noel Perez
and move this Court to dismiss the appeal of
R. D. Fitch, et al, or in the alternative that the
decision below be affirmed.

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STATEMENT OF THE CASE

As admitted by the Appellants in their Jurisdictional Statement, the issue presented to this Court does not deal with the Voting Rights Act (42 U.S.C. § 1973(c), et. seq.), its constitutionality or even the correctness of its application to the State of Texas. (J.S. 2-3). ^{1]} Rather this Court is being asked to consider whether the Three Judge District Court was correct in entering a consent decree which was the result of an open negotiation in which the Appellants themselves as well as their counsel took an open and active role. (Id.).

The uncontested facts establish that the apportionment of the Frio County Texas Commissioners Court ^{2]} was objected to by the U. S. Department of Justice as being violative of the Voting Rights Act. Immediately thereafter, on April 22, 1976, the Appellees Silva and others

^{1]} J. S. refers to the Jurisdictional Statement. A. J. S. refers to the Appendix to the Jurisdictional Statement included in Petitioner's Jurisdictional Statement at 12-31.

^{2]} In Texas the County Commission is referred to as the Commissioner Court. Under the State Constitution a Commissioners Court is comprised of a County Judge, elected at large, and four (4) Commissioners elected from districts.

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filed suit in Federal Court to enjoin the use of the objected to plan for the 1976 election year. The Defendants named were the members of the Commissioners Court who by law are required to apportion the County. (A.J.S. 23). In addition the County Clerk, the Sheriff and the Chairperson of the Democratic and Raza Unida Parties were sued because, under state law, they comprise the county election Board which has the duty to carry out the logistics of elections including ordering the ballots, designating the polling places and collecting the ballots. As such, they were included solely to insure that injunctive relief, should it be granted, would run against all persons responsible for holding the election.

At a hearing on the Temporary Restraining Order held April, 1976, the single Judge granted the Restraining Order and requested that Chief Judge Brown name a three Judge panel to hear the substantive issues before the Court. During this first hearing on the Temporary Restraining Order all named Defendants (Appellants before this Court) were present in person as well as the County Attorney and a special County Attorney hired by the County to represent the County Officials. In open Court, in front of all the Defendants, the special County Attorney entered an appearance on behalf of all Defendants except Rudy Gonzales, the Frio County Chairman of the Raza Unida Party, who was present and chose to represent himself and Commissioner Noel Perez who was represented by Luis M. Segura.

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Thereafter, counsel for the County Officials entered into talks with the Plaintiffs which culminated in an open negotiation session in which both the County Officials and the Plaintiffs, themselves, took open and active roles. At that session, held May 31, 1976, the members of the Commissioners Court voted to agree to a compromise apportionment of Frio County and to a specified amount as attorneys' fees to the counsel for Plaintiffs. The County Officials who are charged by law with the logistical operation of the elections were consulted and new elections were set according to their specifications allowing time to print ballots, conduct absentee voting and the like. All agreements were reduced to writing approved by counsel for both parties in the form of a consent order and presented to the Three Judge Court as a final settlement. This Order was dated June 28, 1976, and appears in A. J. S. at 22-27.

Thereafter, the County Defendants, with the exception of Commissioner Noel Perez, became dissatisfied with the compromise, discharged their Special County Attorney and hired a new Special County Attorney. This new Special County Attorney filed a Motion to vacate the original Consent Decree alleging inter alia fraud and malfeasance on the part of the original Special County Attorney. The Motion to Vacate was supported by affidavits of several of the County Officials setting out in very broad, non-specific terms what they considered as constituting fraud and malfeasance. On August 5, 1976, the Three Judge District vacated the Consent Decree and set the cause down for hearing on

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September 2, 1976. Thereafter, defendants, Rudy Gonzalez, The Raza Unida Party Chairman and Noel Perez, one of the members of the Commissioners Court, moved in separate documents to be realigned as Parties Plaintiff, alleging that the actions of the other members of Commissioners Court were harmful to the interests of the population of Frio County and intended only to perpetuate themselves in office. These motions were unopposed by the new Special County Attorney and Gonzales and Perez were realigned.

On the motion of the Plaintiffs and with no opposition from the Defendants, the hearing on September 2, 1976, was consolidated with a trial on the merits. At the trial, the Defendant County Officials adduced evidence through seven (7) witnesses. The testimony was subjected to cross-examination by counsel for the original Plaintiffs as well as for the realigned Defendants. At the conclusion of the hearing, the Court read an oral Order from the bench finding against all contentions of the defendant County Officials and for the Plaintiffs on all counts. A written Order was entered by the Court on September 20, 1976, and appears at A. J. S. 17 - 19. Specifically the three Judge Court found that "the agreed settlement of May 31, 1976, . . . (entered by the Court nunc pro tunc June 28, 1976) changing the precinct voting boundaries in Frio County, Texas, was entered into by the Defendants voluntarily and not as a result of fraud or compulsion." (id. at 18). The remaining issues in the case were remanded to the originating Judge to

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handle as single Judge matters. (Id. at 19).

On October 1, 1976, a hearing was held on remaining issues. After testimony, the Court awarded attorneys' fees to the counsel for the Plaintiffs at the rate of Fifty (\$50.00) Dollars per hour. (A. J. S. at 14-17).

This Motion to Affirm is filed on behalf of the original parties Defendant, Rudy Gonzales and Noel Perez, who were realigned as parties Plaintiff. An additional Motion to Affirm is expected to be filed by the original Plaintiffs, Hijinio Silva, et al.

ARGUMENT

THERE IS NO SUBSTANTIAL FEDERAL QUESTIONS PRESENTED BY THIS APPEAL

As the facts clearly make out, the County Officials are unhappy with the Consent Decree they entered into. The Three Judge Court heard their evidence and unanimously found that the settlement was made "voluntarily and not as the result of fraud or compulsion". (A. J. S. 18). In plain English, the Defendants attempted to fishtail or welsh 'on their compromise. The Court refused to allow them such latitude.

Appellant County Officials argue somehow that they have had no due process and have been denied a full hearing of their position. They claim

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that they were confused by the advice of their first Special County Attorney and hint at unethical practice on his part. Their position strains credibility. They somehow choose to ignore the fact that there was a full trial on the merits in this case conducted by their second Special County Attorney at which seven witnesses appeared and testified. At the trial all three Federal Judges dismissed their claims as being absolutely without merit. (A. J. S. 17 - 18). In fact, the Court was so concerned about the insinuation of misdealing on the part of the first Special Attorney as to issue an Order in which his conduct was approved.

In such posture, this case presents at best the situation of disappointed litigants appealing solely on the basis of their disappointment. They cite no cases other than those supporting an opportunity to be heard. They had such an opportunity. A trial on the merits was held. (A. J. S. 17 - 19). They lost. In order to appeal they must frame issues to justify the appeal, not continue to complain about their loss.

CONCLUSION

There are no substantial federal issues and certainly no constitutional questions raised by the Appellants in the narrow prospectus presented by this case. Indeed, the result which they seem to seek from this Court would logically end only in a reconsideration on remand of the advice given by the first Special Attorney. His activities have already

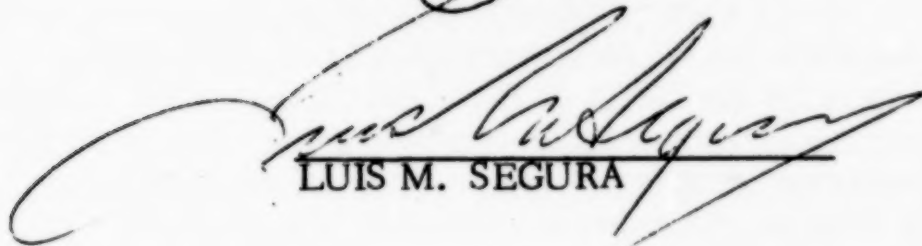
(8)

been the subject of intense scrutiny and no problems whatsoever were found by the District Court. A second such examination would not only be pointless but also wasteful of judicial energy.

WHEREFORE, PREMISES CONSIDERED, this Court should affirm the Judgment of the Court below.

Respectfully Submitted,


GEORGE J. KORBEL


LUIS M. SEGURA

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this Court, hereby certifies that three copies of the foregoing motion has this the 21st day of January, 1977, been served upon each counsel of record in accordance with the Rules of this Court, by depositing the same in the United States mailbox, with first class postage, prepaid, addressed to said counsel at their post office addresses.


GEORGE J. KORBEL